

Wheat Ridge as its community of license and to substitute Channel 249A for vacant Channel 227A at Westcliffe, Colorado (collectively, the “*NPRM Proposal*”). By *Memorandum Opinion and Order*, DA 04-2463 (rel. August 9, 2004) (the “*MO&O*”), the Assistant Chief, Audio Division denied the Petition for Reconsideration of the *Report and Order* filed by Meadowlark.

This matter relates to the dismissal of the counterproposal submitted by Meadowlark in this proceeding (the “Meadowlark Counterproposal”). The Meadowlark Counterproposal had sought, *inter alia*, the allotment of Channel 248C to Creede, Colorado, which was inconsistent with the *NPRM Proposal* to modify the Westcliffe, Colorado allotment to Channel 249A. Moreover, the Meadowlark Counterproposal was contingent on the reclassification of Station KRFX(FM), Channel 278C, Denver, Colorado (also licensed to Jacor), from a Class C to a Class C0 station, in the pending, separate proceeding, *Order to Show Cause, Reclassification of License of Station KRFX(FM), Denver, Colorado*, 18 FCC Rcd 3220 (MB 2003) (“*Order to Show Cause*”). ^{3/} The *Report and Order* dismissed the Meadowlark Counterproposal, noting that “Jacor ... has responded to the *Order to Show Cause* by filing an application for Channel 278 as a full Class C facility. Until the application for

^{3/} The *Order to Show Cause* was issued in response to an original petition for rule making filed by Akron Broadcasting Company seeking to amend the FM Table of Allotments by allotting Channel 279C1 at Akron, Colorado, and, to accommodate such allotment, requesting the reclassification of Station KRFX to Class C0. Jacor, as the licensee of KRFX, filed a response to the *KRFX Order* stating that KRFX would file an application to maintain full Class C status, and, in fact, such a minor modification application was filed by Jacor with the Commission on April 24, 2003. See FCC File No. BPH-20030424AAO (the “KRFX Application”).

Channel 278C at Denver is dismissed, the counterproposal filed by Meadowlark is technically defective.” 4/

In its Petition for Reconsideration, Meadowlark argued that the Division committed “cardinal procedural error” in dismissing the Meadowlark Counterproposal. 5/ Citing to inapposite case law, Meadowlark suggested that the Division somehow inappropriately “bifurcated” this rule making proceeding from the distinct KRFX *Order to Show Cause* proceeding. Thus, argued Meadowlark, the Division should have considered in this docket the “merits or lack of merits of the KRFX Application,” together with the *NPRM* Proposal and the Meadowlark Counterproposal. 6/

Jacor argued in its Opposition to the Petition for Reconsideration that it would have been “cardinal procedural error,” *if* the Division had *failed* to dismiss the Meadowlark Counterproposal, which was technically defective at the time of its filing. Jacor noted that it is established FCC procedure that counterproposals in allotment proceedings must be technically correct and substantially complete at the time of filing. 7/ Specifically, it is Commission policy “not to accept rulemaking proposals that are contingent on the licensing of facilities set forth in an outstanding construction permit or are dependent upon final action in another rulemaking

4/ See Report and Order at ¶ 6 (citing 1998 Biennial Regulatory Review – Streamlining of Radio Technical Rules in Parts 73 and 74 of the Commission's Rules, 15 FCC Rcd 21,649 (2000) (“Biennial Review”)).

5/ See Petition for Reconsideration at ¶ 2.

6/ See *id.* at ¶ 8.

7/ See e.g., *Carlisle, Irvine, and Morehead, Kentucky*, 12 FCC Rcd 13,181 at ¶ 4 (Allocations Br. 1997) (counterproposal is not “technically correct and substantially complete” at the time of filing when short-spaced to licensed site; “[p]roposals and counterproposals are supposed to be capable of being effectuated at the time they are granted and cannot be contingent upon future actions.”).

proceeding.” 8/ Even more specifically, the Commission expressly provided in *Biennial Review* that “reclassification [from Class C to Class C0 in an allotment proceeding] may be initiated only through an *original* petition for rule making to amend the FM Table of Allotments, and not through comments or counterproposals.” 9/ Jacor noted that because the Meadowlark Counterproposal was technically defective at the time of filing, there was no cognizable counterproposal for the Commission to compare against the *NPRM* Proposal. Jacor also observed that because it is dispositive that, *at the time of filing*, the Meadowlark Counterproposal was impermissibly contingent on a request to reclassify KRFX, even if, assuming *arguendo*, KRFX is eventually reclassified as a Class C0 station, such action would come too late to rehabilitate the Meadowlark Counterproposal. 10/

The Bureau properly denied Meadowlark’s Petition for Reconsideration and Motion to Consolidate in the *Report and Order*. The Bureau explained: “the Commission specifically stated that a notice of proposed rule making will only be issued after the reclassification issue has been resolved. This is necessary to avoid the disruption of the efficient and orderly processing of rulemaking proposals by avoiding delays and uncertainties for the parties because the ultimate status of the Class C station is not yet known. For this

8/ *Saint Joseph, Clayton, Ruston, and Wisner, Louisiana*, 18 FCC Rcd 22 at ¶ 13 (Ass’t Chief, Audio Div., rel. Jan. 8, 2003) (footnotes omitted).

9/ *Biennial Regulatory Review*, 15 FCC Rcd at ¶ 28 (emphasis added); *see also* Note 2 to Section 1.420(g) of the Commission’s Rules (“The reclassification of a Class C station in accordance with the procedure set forth in NOTE 4 to § 73.3573 may be initiated through the filing of an *original petition* for amendment of the FM Table of Allotments.”) (emphasis added).

10/ Thus, Jacor asserted that there was no basis for Meadowlark’s separate Motion to Consolidate, which requested the consolidation of this rulemaking proceeding with the KRFX Application proceeding.

reason, the reclassification procedure is not available to the party filing the counterproposal.” 11/ The Bureau further stated “we will not consider the Meadowlark Counterproposal in this proceeding because it is not an acceptable *bona fide* proposal entitled to comparative consideration because Jacor Broadcasting has filed the requisite application to maintain Station KFRX’s existing protection as a Class C station.” 12/

Meadowlark asserts in its Application for Review that this proceeding involves unique issues never before decided by the full Commission. 13/ To the contrary, the Commission precisely dictated in *Biennial Review* the procedure followed here by the Bureau for counterproposals reliant on Class C/C0 reclassifications – that is, that such counterproposals may not be considered. What Meadowlark’s Application for Review really amounts to is an untimely petition for reconsideration of the process adopted by the Commission in *Biennial Review*. As such the Application for Review should be denied.

In sum, the Audio Division correctly implemented Commission precedent and the Commission’s *Biennial Review* procedures by dismissing the Meadowlark Counterproposal as technically deficient. The Commission should deny the Meadowlark Application for Review.

11/ *Report and Order* at ¶ 5 (footnote omitted) (citing *Biennial Review*).

12/ *Id.* at ¶ 6 (footnote omitted) (contrasting to *Ashbacker Radio Corporation v. FCC*, 326 U.S. 327 (1945), which requires two *bona fide* applications in order to have comparative consideration).

13/ *See Application for Review* at ¶ 8.

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Certificate of Service

I, Regina Hogan, hereby certify that on this 14th day of September, 2004, a copy of the foregoing **Opposition To Application For Review** was sent by first-class mail, postage prepaid, to:

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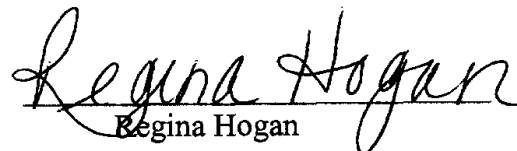
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